No. 137

In the Supreme Court of the United States

OCTOBER TERM, 1958

JAMES P. MITCHELL, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, PETITIONER

v.

LUBLIN, McGAUGHY & ASSOCIATES, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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CITATIONS

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The Solicitor General, on behalf of the Secretary of Labor, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit, entered in the above case on November 25, 1957.

OPINIONS BELOW

The opinion of the District Court (R. 1a–9a)[1] is not officially reported (13 WH Cases 211). The opinion of the Court of Appeals (App. A, *infra*, pp. 29–44) is reported at 250 F. 2d 253.

[1] Record references are to petitioner's appendix as printed for the use of the Court of Appeals, nine copies of which have been filed with the Court.

JURISDICTION

The judgment of the Court of Appeals was entered on November 25, 1957 (App. A, *infra*, p. 44). The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Respondents are partners in a consultant architectural-engineering business—with offices in Norfolk, Virginia and in Washington, D. C., and foreign associates overseas—engaged in preparing plans and specifications essentially for industrial, as distinguished from residential, projects. A substantial proportion of their work is for out-of-state clientele or projects, and the great bulk of it consists of the preparation of plans and specifications for federal, state and municipal governmental projects, many of which are for the improvement, repair, or enlargement of interstate instrumentalities or facilities.

The question presented is: Whether respondents' non-professional employees (draftsmen, fieldmen, and clerical workers)—who work on the plans and specifications for projects for improvement of interstate instrumentalities or facilities, and whose regular duties also include the preparation of drawings, plans, specifications, etc., transmitted across state lines, or direct and substantial interstate communication by telephone and correspondence, or travel across state lines—are engaged "in commerce or in the production of goods for commerce" within the meaning of the Fair Labor Standards Act.

STATUTES INVOLVED

Pertinent provisions of the Fair Labor Standards Act of 1938, c. 676, 52 Stat. 1060, as amended, c. 736, 63 Stat. 910 (29 U. S. C. 201, *et seq.*), are set forth in full in petitioner's appendix as printed for the Court of Appeals (R. 116a–119a). The provisions particularly involved here are Sections 3 (b), (i), and (j), as follows:

> SEC. 3. [52 Stat. 1061; 63 Stat. 911]. As used in this Act—
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> * * * * * *
>
> (b) "Commerce" means trade, commerce, transportation, transmission, or communication among the several States or between any State and any place outside thereof.
>
> * * * * * *
>
> (i) "Goods" means goods (including ships and marine equipment), wares, products, commodities, merchandise, or articles or subjects of commerce of any character, or any part or ingredient thereof, but does not include goods after their delivery into the actual physical possession of the ultimate consumer thereof other than a producer, manufacturer, or processor thereof.
>
> (j) "Produced" means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purposes of this Act an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such

goods, or in any closely related process or occupation directly essential to the production thereof, in any State.

STATEMENT

This action was brought by the Secretary of Labor under Section 17 of the Fair Labor Standards Act to enjoin respondents from violating the overtime and record-keeping requirements of the Act with respect to their non-professional employees—draftsmen, fieldmen and stenographer-bookkeepers.[1]

1. Respondents are partners engaged in a consultant architectural-engineering business, with a principal office in Norfolk, Virginia, and a branch office in Washington, D. C., and with foreign associates in France and Italy.

Respondents' business relates essentially to industrial, as distinguished from residential, projects, and admittedly a substantial amount of their work is for out-of-state projects and out-of-state clientele, at

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[1] It is stipulated that, if the Act covers these employees, overtime and record-keeping violations exist (Stip. R. 11a; R. 94a-97a). This action is not concerned with "professional" employees who may meet the requirements for exemption under Section 13 (a) (1) of the Act, which provides:

"(a) The provisions of sections 6 and 7 shall not apply with respect to (1) any employee employed in a bona fide executive, administrative, professional, or local retailing capacity, or in the capacity of outside salesman (as such terms are defined and delimited by regulations of the Administrator); * * *."

The exemption issue was not raised by respondents in the courts below and is not presented here, the only issue being whether employees who do not qualify as exempt "professional" employees as defined and delimited by the Secretary of Labor are within the general coverage of the Act. See 29 C. F. R. (1957 Supp.) Pt. 541.3; 14 F. R. 7705.

least 50% of the work of the Washington office relating to out-of-state projects (R. 13a). As summarized in the opinion below, "[t]hey have worked and are now employed on numerous projects in Virginia, Maryland and the District of Columbia, and have worked on some projects in North Carolina and overseas" (App. A, *infra*, p. 31). "These activities require constant co-ordination and communication, as well as transmission of information and materials between the two offices" (*ibid.*). The plans and specifications are "frequently transmitted out of state" (R. 6a), both between respondents' offices for correlation, integration or review (R. 68a, 72a), and, as indicated in more detail, *infra*, pp. 8–10, to out-of-state clients with copies for out-of-state bidders, contractors and suppliers of materials.

Respondents employ a total of 65 to 70 employees (including professional and non-professional), of whom about 30 are in the Norfolk office, about 20 in the Washington office, and about 15 to 20 overseas (R. 12a, 85a). With "a direct private telephone line between the Norfolk and Washington offices," "telephonic communications are numerous and the line is used for the purpose of controlling, supervising and coordinating the work of the Washington office from Norfolk" (R. 5a). Also, "payrolls for both offices, as well as for employees in foreign offices are made up in the Norfolk office and checks are mailed to Washington and foreign countries" (*ibid.*). No set rule is maintained with respect to where a set of plans is prepared—"if we want to do part in Washington we do it; if we want to do part in Norfolk, we do it" (R. 68a). As both the trial court and the Court of

Appeals found, respondents' non-professional draftsmen, fieldmen and clerical employees engage substantially in the extensive interstate communications or interstate travel incident to respondents' business and in the preparation of plans, drawings, specifications, etc., "many of which are transmitted across state lines," and many of which are prepared for interstate projects (App. A, *infra*, pp. 32–34; R. 5a–6a).

2. The great bulk of respondents' business consists of the preparation of plans, specifications and drawings for federal, state and municipal governmental projects. As stated in the opinion below, they "include, primarily, projects for the improvement, enlargement and repair of installations at military bases, airfields, shipyards and radio stations for the United States military services, and also a substantial number of state and municipal undertakings and projects." (App. A, *infra*, p. 31.) About 60 percent of the work of the Virginia office is done pursuant to contracts with United States Army and Navy agencies, and about 85 percent of the work of the Washington office is for the Army and Navy or for state and municipal government agencies (R. 2a). For details of the numerous projects for improvement, repair, or enlargement of interstate instrumentalities or facilities, on which respondents worked for the two year period ending April 1956, see Appendix B, *infra*, pp. 45–47.

3. The plans and specifications furnished by respondents for such projects contain detailed drawings, blueprints, surveys, estimates and other data, together with specific detailed instructions to the builder on

every aspect of the actual construction work. The industrial-type projects, and particularly the government projects, on which respondents have been primarily engaged "could not be constructed without the plans and specifications prepared by the [respondents'] employees" (App. A, *infra*, p. 32; R. 48a–49a). These plans and specifications obviously include much more than a professional architect's designs and advice. As is illustrated by the voluminous sets of plans and specifications prepared by respondents for projects listed in Appendix A to the stipulation (R. 18a–29a),[3] most of the work is evidently more engineering than architectural in nature, and it involves the assembling and compilation of detailed estimates, measurements, field survey information, materials and equipment specifications, carpentry, electrical and other construction data, and similar routine work of a non-professional nature.

The plans and specifications include in minute detail all of the data, information, and instructions needed to guide the clients and their contractors, subcontractors and material suppliers, in bidding, financing, purchasing materials and equipment, as well as in carrying out the actual construction work (R. 100a). The specifications include not only the general conditions, which are to govern the construc-

[3] Representative samples of such plans and specifications were attached to the stipulation as Appendix C (R. 12a, 33a) and an illustrative set of specifications was introduced as Plaintiff's Exh. 4 (R. 44a–45a). Because of their bulk, they were transmitted to the Court of Appeals in original form and were not printed in the record.

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tion work, but also specific data in regard to the kinds, types, sizes of materials to be used, and where and how they enter into the construction. For example, on projects requiring substantial brick work or concrete, the composition and precise proportions of the mixture of brick mortar and concrete, as well as the method of mixing, are specified in detail. It is common knowledge that plans and specifications for government construction projects, in particular, require such detailed data and instructions.

4. The plans and specifications prepared for various federal, state, and municipal government agencies (which have been the source of the bulk of respondents' business, Stip. R. 13a) are submitted to these agencies in their original form and become the property of the agencies (Stip. R. 14a). Since such government agencies frequently require numerous copies of the specifications, respondents prepare and furnish "original, reproducible drawings and tracings (plans), and stencils for making multiple copies" (Stip. R. 13a). As stated in the findings of the trial court, the "government contracts admittedly require a great number of specifications which are reproduced by an independent blueprint company and are subsequently sent by the government agencies to prospective bidders, many of whom are without the State of Virginia and the District of Columbia" (R. 2a–3a).

A large portion of the governmental work (the full 60 percent at the Norfolk office) is done for the United States Army and Navy (*ibid.*). The plans, drawings, specifications, estimates, and advance-planning reports prepared by respondents' employees for

these projects are furnished primarily to the Corps of Engineers, the Fifth Naval District, and the Potomac River Naval Command (R. 112a, 113a, 68a). Copies of all preliminary plans, specifications, and analyses of design furnished to the Norfolk District Corps of Engineers are transmitted to the Division Engineer, North Atlantic Division, New York, for review and approval; for large projects, marked-up drafts of final specifications are also transmitted to New York for review and approval; and in all cases, a set of the completed final plans and specifications as furnished to prospective bidders are transmitted to the North Atlantic Division in New York for record purposes (Govt's. Exh. No. 2, R. 113a–114a). Similarly, all advance-planning reports and copies of all plans and specifications furnished by respondents to the Fifth Naval District at Norfolk are forwarded to the Bureau of Yards and Docks, Washington, D. C., for review and approval (Govt's. Exh. No. 1, R. 112a–113a).

Copies of the final plans and specifications are also sent to any out-of-state contractors who are interested in submitting bids (Govt's. Exhs. 1, 2 and 3, R. 112a–115a). In connection with any proposed large project, it is the regular practice of the Corps of Engineers to send out advance notice to approximately 400 general contractors, major subcontractors and suppliers, and this notice "always results in requests for sets of plans and specifications from several out-of-state contracting firms," in response to which sets are sent to "several firms outside the State of Virginia to enable them to prepare and submit bids"

(R. 115a). Since general contractors need more than one set, two or three sets of plans and specifications are sent upon request (*ibid.*). With respect to projects for the Army and Navy agencies, respondents have reason and knowledge to expect that copies of the plans and specifications furnished by them will be thus sent out-of-state to prospective bidders (R. 46a–47a).

There is, also, interstate transmission of plans, drawings and specifications for municipal governmental projects. The numerous surveys, drawings, plans, etc. for the approximately 50 individual projects for the Washington Suburban Sanitation Commission, located in Maryland (Jobs Nos. 893–893–3, 939–939–24; R. 23a, 26a–27a, 65a), were prepared in respondents' District of Columbia office and submitted to the Commission at its headquarters in Hyattsville, Maryland; in addition to the final plans, several drafts of preliminary plans and drawings relating to particular projects were thus transmitted out-of-state to the Commission for approval, examination, and suggestions (R. 65a).[4]

[4] There is likewise considerable interstate transmission of plans and specifications for non-governmental projects to out-of-state bidders (R. 61a–62a), or to out-of-state representatives of important prospective tenants for approval (R. 58a–59a, 63a–64a). Where respondents' employees supervise the actual construction of the projects (for about 50 percent of their non-governmental clients, R. 15a), "shop drawings" on articles, materials, and equipment to be installed or used in the construction are submitted by subcontractors (through the contractor) to respondents, for checking and approval to make sure that the specifications are met. These drawings relate to such equipment and materials as doors, windows, floor material, bricks and prefabricated partitions. Some of the ma-

5. The decision below that none of respondents' employees is engaged "in commerce or in the production of goods for commerce" within the coverage of the Act rested, basically, on the ground that the preparation of plans and specifications by an independent architectural-engineering consultant firm is an "essentially local" business and that any interstate activities are "merely incidental to the local enterprise" (App. A, *infra*, p. 40). Although recognizing that the plans and specifications "consist of physical material" and that "many * * * are transmitted across state lines" (*id.* at 32), the Court of Appeals held that their preparation was not production of "goods" for "commerce" within the meaning of the statutory definitions because they are "only a written embodiment of professional advice * * * specifically prepared to meet the particular problem of a specific client and are not sold or offered for sale to the public generally" (*id.* at 35). The admitted direct and substantial participation in interstate communications and transmission of information and materials, and interstate travel, by individual employees, and their work in preparing plans and specifications for specific interstate projects, were held to be outside the scope of the Act on the ground that "[a]ll of these activities related to the production of plans,

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terials or equipment is submitted in the form of samples. After the drawing or samples have been checked and/or corrected they are returned to the contractor and then sent back to the manufacturer or supplier. According to an employee in the Norfolk office, one-half of the drawings examined and corrected by him were from manufacturers located outside the State of Virginia (R. 81a–83a).

partook of their intrastate character and cannot be fairly characterized as commerce between States" (*id.* at 41).

REASONS FOR GRANTING THE WRIT

The decision below, in its ruling that respondents' employees are not engaged "in commerce" under the Fair Labor Standards Act, conflicts directly with the decision of the Court of Appeals for the Eighth Circuit in *Mitchell* v. *Brown Engineering Co.*, 224 F. 2d 359, certiorari denied, 350 U. S. 875, and is also in conflict with decisions of other Courts of Appeals in closely analogous cases. In its construction of both the "in commerce" and the "production of goods for commerce" phases of the Act's coverage, the decision is inconsistent with this Court's rulings. The issues presented would be of large importance even if their impact were limited to workers employed by similar architectural-engineering consultant firms. But the importance of the issues is greatly magnified by the implications of the opinion which would affect the Act's coverage of numerous employees in many other types of businesses which might with equal, or more reason be characterized as "essentially local."

1. The Fourth Circuit's decision is in direct conflict with that of the Court of Appeals for the Eighth Circuit in *Mitchell* v. *Brown Engineering Co., supra,* which involved the coverage of precisely the same type of employees of a firm engaged in precisely the same kind of consultant architectural and engineering business, except that the Brown Engineering firm limited its operations to projects within the same state and

had no out-of-state branch offices or associates.[5] The Eighth Circuit held that the Brown firm's non-professional employees were engaged "in commerce" by reason of their participation in the preparation of plans and specifications for projects for the repair and improvement of instrumentalities of commerce (roads, highways, and power plant facilities), and therefore that court did not need to determine whether they were also engaged in "production of goods for commerce." The court rejected the contention, strenuously urged there with much more reason than the facts of the instant case would justify, that consultant architectural-engineering work is an "essentially local" business and that the preparation of plans and specifications for improvement or repair of interstate instrumentalities and facilities was too remote from interstate commerce to be within the scope of the Act's coverage.

In contrast to the Fourth Circuit's erroneous concept of the nature of this type of business, the Eighth Circuit, in accord with the guiding principles of this Court's decisions, viewed the preparation of plans and specifications "in a practical aspect in relation to the whole construction project" for which they were specifically designed. It concluded that, thus viewed, such work is no more "isolated, local activity" than "actual manual labor on the projects under repair and improvement" and is "in practical effect" as direct and vital a part of the project for improvement of the instrumentalities or facilities of interstate com-

[5] The opinion below recognizes the conflict with the Eighth Circuit (App. A, *infra*, p. 43).

merce as the physical construction work which depends entirely upon, and is directly guided in every detail, by such plans and specifications. The significance which the Fourth Circuit attaches to the "independent enterprise" of the employer is specifically in conflict with the Eighth Circuit's ruling that this factor "is of minor significance", in view of the settled principle that coverage is "determined on the basis of the employee's activity and not by the nature of the employer's business" (224 F. 2d at 365).

2. As the court below itself appears to agree (App. A, *infra*, p. 41), its decision, apart from this "independent enterprise" factor, also runs counter to the decisions of the Second and Ninth Circuits in *Laudadio* v. *White Construction Co.*, 163 F. 2d 383, and *Ritch* v. *Puget Sound Bridge and Dredging Co.*, 156 F. 2d 334. The Courts of Appeals there held that the Act covered draftsmen and clerical workers preparing the plans and drawings for, as well as the workers engaged in the actual construction of, projects for the improvement and expansion of interstate instrumentalities.[6] In opposition to the Fourth Circuit's view that the Act's coverage is limited to employees participating "actively at the site of construction" (App. A, *infra*, p. 43), the Ninth Circuit in the *Ritch* case ruled that no such distinction could rationally be drawn between the so-called "white collar" workers (the

[6] The project in the *Laudadio* case was extension of runways at a naval air base, and the project in *Ritch* was dredging channels for the improvement of the harbor at the Bremerton Navy Yard, *i. e.*, both projects of the same kind that comprise a primary part of the business of the respondent Lublin, McGaughy firm.

"draftsmen engaged in designing and laying out the work to be done by others") and the workers engaged in the actual dredging and construction operations which were performed "all pursuant to the draftsmen's plans."[1]

Similarly, the ruling below that the Act does not cover the employees' regular and extensive interstate communications and interstate travel, required by reason of the multi-state nature of the respondent firm's organization and operations, is inconsistent with the reasoning of the recent decisions of the Eighth and First Circuits in *Mitchell* v. *Kroger Co.*, 248 F. 2d 935 (C. A. 8), and *Aetna Finance Co.* v. *Mitchell*, 247 F. 2d 190 (C. A. 1). *Kroger* involved the coverage of interstate travel and interstate communications of auditors employed by a multi-state chain organization to make audits at its local retail units in two states, and to transmit their auditing reports to branch headquarters. Pointing out that such communication and

[1] The narrow view expressed in the ruling below is also contrary to the Fourth Circuit's own earlier decision in *Bennett* v. *V. P. Loftis Co.*, 167 F. 2d 286. In that case, the court held the nightwatchman guarding a road bridge under construction to be engaged "in commerce" within the coverage of the Act, "although [the watchman] took no part in the actual construction of the bridge in the sense of driving nails, or pouring concrete, or the like," on the specific ground that (167 F. 2d at 288):

"If the declared purpose of the Act is to be accomplished, a project should be considered as a whole, in a realistic way; *not broken down into its various phases so as to defeat the purpose of the Act.* This latter unrealistic approach was condemned by the Supreme Court in *Walling* v. *Jacksonville Paper Co.*, 317 U. S. 564. [Emphasis added.]"

travel are "'transportation, transmission and communication' between states within the meaning and the literal terms of the statute" (248 F. 2d at 939), the Eighth Circuit held that there is "nothing to justify Congressional intent to the contrary," and that, "[i]nstead of a strict or limited construction," this Court's decisions required "a liberal construction" of the statutory terms of coverage—in particular a construction that does "not narrowly circumscribe the meaning of the phrase 'engaged in commerce' *or detract in any way from the statutory definition as to* the meaning of commerce itself" (*id.* at 938, emphasis added). *Kroger* held not only that the auditors' interstate communication and travel were "literally within the Act's coverage" (*ibid*), but also, on the basis of practical facts comparable to those here, that such interstate communication and travel were not "merely incident to a local retail business" but were "a part and parcel of the Kroger Company's interstate activity" (*id.* at 939). In *Aetna Finance,* the First Circuit held that employees of a branch office of a small loan company were engaged "in commerce" by reason of their interstate communication, correspondence and transmission of various reports and documents, even though over 95% of the branch office's business consisted of loans to local borrowers within the same state. The court found no difficulty in agreeing with the District Court's ruling that coverage of these activities was sufficiently sustained *either* by reason of the small proportion of the branch's business with out-of-state borrowers *or* by reason of the relationship of the

branch employees' work "to the conduct and furtherance of defendant's nationwide business" under the "broad guiding principles" of this Court's decisions (247 F. 2d at 192, affirming 144 F. Supp. 528 at 533).[8]

3. The Fourth Circuit's decision is likewise inconsistent with this Court's decisions construing the coverage of the Act and establishing the guiding principles for determining whether particular employees are covered.

(*a*). The decision rests mainly, if not solely, upon a supposed analogy between the instant case and *10 East 40th Street* v. *Callus*, 325 U. S. 578, on the unsubstantiated premise that a consulting architectural and engineering business of the type here involved is "essentially local." Apart from the error in the court's view of respondents' business as "essentially local" (see *supra*, pp. 4–6, 8–10; *infra*, pp. 24, 26, 45–47), *Callus* lends no support to the conclusion that individual employees engaged substantially and directly in interstate activities are excluded from the Act's coverage if the employer's business is shown to be an "essentially local" enterprise. On the contrary, this Court has specifically and repeatedly held that "the applicability of the Act is dependent on the character of the employee's work," and therefore "the fact that all of respondent's [employer's] business is not shown to

[8] The ruling below on interstate communication is also in conflict with the decision of the District Court in *Durkin* v. *Joyce Agency, Inc.*, 110 F. Supp. 918, which was affirmed *per curiam* by this Court *sub nom. Mitchell* v. *Joyce Agency, Inc.*, 348 U. S. 945, reversing the Seventh Circuit's decision (211 F. 2d 241), which had held specifically, *inter alia*, that so-called "internal" interstate communication was not within the coverage of the Act.

have interstate character is not important" (*Walling* v. *Jacksonville Paper Co.*, 317 U. S. 564, 571–572; *Kirschbaum Co.* v. *Walling*, 316 U. S. 517, 524). The ruling below is also inconsistent with the well-settled principle, most recently reemphasized in *Mitchell* v. *Vollmer & Co.*, 349 U. S. 427, that the statutory terms of coverage of this Act must be given a "liberal" construction, and that the literal terms of the statutory definitions should be accorded the "breadth of coverage" consistent with the "terms of substantial universality" in which the broad purposes of the Act are stated (*Powell* v. *United States Cartridge Co.*, 339 U. S. 497, 516).

Specifically, *Callus* is not an authority for excluding employees from the coverage of the Act simply because they are employed by an "independent enterprise" performing work "for a general miscellany of clients" (App. A, *infra*, pp. 42–43). In no respect material to the Act's coverage can either the employer's enterprise or the employees' activities in this case be likened to *Callus*, where neither the employer nor the employees engaged directly in any interstate activities and where the claim of coverage rested solely upon "thin" evidence of relationship to interstate manufacturing carried on by some of the building tenants elsewhere. Even on the "thin" evidence there presented, *Callus* found the question of coverage to be a very close one. Plainly, no such close borderline question is presented with respect to respondents' employees who are admittedly engaged directly and substantially in interstate "transporta-

tion, transmission, or communication" within the literal terms of the statutory definition.

The Fourth Circuit's extension of *Callus* is not only inconsistent with the principles established by this Court's jurisprudence on the coverage of this Act, but it is also contrary to decisions applying these principles to employees of independent enterprises dealing with a miscellany of customers. Thus in *Roland Electric Co.* v. *Walling*, 326 U. S. 657, the Court upheld coverage of employees of an independent electrical contracting company serving a general miscellany of customers, on the basis of evidence that the employees regularly performed work for 33 customers (out of a total of approximately 1,000) who were engaged in commerce or in production of goods for commerce. See also *Schulte Co.* v. *Gangi*, 328 U. S. 108, 118, sustaining coverage even of *building maintenance* employees in an independently operated building tenanted by a general miscellany of occupants, where the evidence showed that a sufficiently substantial proportion of the occupants were regularly engaged in producing various kinds of goods for shipment in interstate commerce.

The coverage ruling of *Roland Electric* was expressly approved by Congress at the time of the enactment of the 1949 amendment to the Fair Labor Standards Act, as were other decisions upholding the coverage of employees of public utilities engaged in supplying fuel, power and water to customers generally, among whom were substantial customers using such fuel, power or water in the production of other goods

for commerce or in the operation of instrumentalities of commerce. See Statement of the Majority of the Senate Conferees (95 Cong. Rec. 14874–75), which says that the work of such employees is covered by the Act "*whether they are employed by the producer of goods or by someone else who has undertaken the performance of particular tasks for the producer*" (*ibid.*, emphasis added). Similarly, the House Managers' report stated that the 1949 Amendments "are not intended to remove from the Act maintenance, custodial, and clerical employees" of the type held covered in *Kirschbaum* and in the public utility decisions, also expressly stating that such employees "will remain subject to the Act, *notwithstanding they are employed by an independent employer* * * *" (95 Cong. Rec. 14929, emphasis added). While these statements were made with reference to the "production for commerce" phase of coverage (which was the coverage provision modified by the 1949 Amendments), the statements were obviously premised on a principle equally applicable to determining coverage of the "in commerce" phase, *i. e.*, that the determining factor is the relationship of the *employee's work* to the interstate commerce regardless of the independent character of the *employer's* enterprise.

(*b*). The ruling below that the plans, specifications and similar materials are not "goods", and therefore the work of preparing and assembling them for transmission in interstate commerce is not "production of goods for commerce", is based on reasoning which is contrary to *Western Union Telegraph Co.* v. *Lenroot*, 323 U. S. 490; *Powell* v. *United States Cartridge Co.*,

339 U. S. 497; *Borden* v. *Borella,* 325 U. S. 679; and *Alstate Construction Co.* v. *Durkin,* 345 U. S. 13.

First, the view that plans and specifications are not "goods" simply because they represent the "embodiment of ideas" (App. A, *infra,* p. 37) is difficult to reconcile with the *Western Union* ruling that "telegraphic messages are clearly 'subjects of commerce' and hence that they are 'goods'" within the scope of the statutory definition, since prior to the adoption of the statutory definition it had been held (in *Western Union Telegraph Co.* v. *Pendleton,* 122 U. S. 347) that "'ideas, wishes, orders, and intelligence' are 'subjects' of the interstate commerce in which telegraph companies engage" (323 U. S. at 502–503). The physical embodiment of mental ideas into tangible and bulky plans and specifications is obviously the product of considerable routine, clerical and other physical work; as is evident from a mere glance at some of the plans and specifications for industrial projects involved in this case. These physical products are tangible materials which can be and are "subjects of commerce" (*i. e.,* interstate "transportation" or "transmission") within the literal terms of the statutory definitions; and their production unquestionably requires the type of routine, clerical, and physical workers with whom this Act is primarily concerned.

Second, the view that such work is outside the contemplation of the Act because *incidental* to professional planning and advice is contradicted by the *Borden* case, *supra,* where maintenance employees of Borden's central office building for its executive

officers and administrative employees were held within the Act's coverage, on the ground that the "economic production" with which this Act is concerned includes "not simply the manual physical labor involved in changing the form or utility of a tangible article" but also "planning and controlling" and the work of one "who conceives or directs a productive activity" (325 U. S. at 683). The apparent confusion by the court below of the Act's "professional" exemption (Section 13 (a) (1)) with the Act's general coverage provisions is contrary to this Court's explicit statement that: "Indeed, the fact that § 13 (a) (1) specifically excludes * * * those employees employed in a bona fide executive, administrative or professional capacity is clearly consistent with the conclusion that these activities are included within" the coverage of the Act, and "that full effect should be given that fact unless otherwise provided" (325 U. S. at 684).*

Third, the view that plans and specifications are not "goods for commerce" because they lack the characteristics of ordinary articles sold commercially to the public generally (App. A, *infra*, pp. 35–36, 37–38) is contrary to the basic rationale of *Powell*, which explicitly repudiated the contention that coverage is limited to "commercial" transactions or to "articles that are intended for sale, exchange or other trading activities" (339 U. S. at 512), while emphasizing the "terms of substantial universality" in which the broad statutory purposes and the statutory coverage definitions are stated (*id.* at 509–516).

* The "professional" exemption is not involved in the present case. See footnote 2, *supra*, p. 4.

Finally, the reasoning below is inconsistent with *Alstate Construction Co., supra,* since the preparation of plans and specifications specifically for use in the improvement of interstate facilities cannot be distinguished from the preparation of road materials for these same purposes, except on the unwarranted assumption that the statutory definition of "goods" is limited to "products" ordinarily sold to the public. The preparation of the plans and specifications for a specific highway improvement project, no less than the preparation of the road materials pursuant to those plans and specifications, directly serves the interstate commerce on that highway. While the road materials may be physically incorporated into the road, the plans and specifications guide and determine the execution of the improvement in every detail from the beginning to the end of the construction work. Both "serve commerce" and are produced specifically and directly "for commerce" in the same degree.

4. The Fourth Circuit's reliance on the paragraph in the Labor Department's Interpretative Bulletin relating to employees of a "local architectural firm" (see App. A, *infra,* p. 36) is misplaced. The term "local architectural firm," and the paragraph in the Interpretative Bulletin, are patently not descriptive of respondents' multi-state practice or of its extensive engineering operations. The statement in the bulletin is merely a restatement (indeed, a quotation) of legislative history from the House Conferees' Report on the 1949 Amendments, which refers only to "the preparation of plans for the alteration of buildings

within the state which are used to produce goods for interstate commerce." (95 Cong. Rec. 14929, par. 5, emphasis added.) It is expressly limited to a "local" business conducted *within the confines of a single state* and related to interstate commerce only indirectly and remotely by reason of the fact that some of the local buildings for which it prepares plans may be "used to produce goods for interstate commerce." This is hardly descriptive of respondents' architectural-engineering enterprise which is not only specifically organized so as to conduct its operations across state lines, but is also engaged extensively in work for out-of-state projects and out-of-state clientele, and, in addition, engages directly and substantially in work for the improvement and expansion of interstate instrumentalities and facilities. The content of the term "local architectural firm" is evident from the other examples cited in the legislative history immediately preceding and following the reference to a "local architectural firm"—*i. e.*, "a local independent nursery concern" whose business might include "mowing the lawn around the plant of a customer *within the state* engaged in producing goods for interstate commerce," and "a local exterminator service firm" whose employees "work *wholly within the state*" serving generally "buildings *within the state*" some of which may be "used to produce goods for interstate commerce" (95 Cong. Rec. 14929, emphasis added)."

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[10] The court also relies (App. A, *infra*, p. 36) on footnote 28 of the Bulletin which contains a "see also" citation of *McComb* v. *Turpin*, 81 F. Supp. 86 (D. Md.). The Fourth Circuit's construction of this "see also" citation as an administrative acceptance and adoption of the reasoning and hold-

5. The importance of the issues presented, even if their impact were limited to employees of similar architectural-engineering firms, is evidenced by the number and size of such firms and the extent to which their business depends upon interstate operations in the modern industrial pattern. While official up-to-date statistics are not available, a recent comprehensive survey of the private practice of engineering in the United States by the publication *Consulting Engineer*,[11] together with some statistics for earlier years in Government reports, leaves no doubt that there are thousands of non-professional employees in this field. According to a 1953 report of the Departments of Commerce and Health, Education and Welfare, 12,219 architectural-engineering consultant firms reported on employees to the Bureau of Old Age and Survivors Insurance, and listed a total of almost

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ing of that decision is, we submit, far-fetched and unwarranted. Even if the citation of that decision could be construed as an administrative acceptance of it, the factual record in the instant case is so different in crucial respects as to preclude any inference that the firm here involved qualifies as a "local architectural firm" within the meaning of the bulletin. As the opinion in the *Turpin* decision repeatedly emphasized, "the stipulation of facts [which was the sole evidence in that case] furnishes only meager information" (81 F. Supp. at 91), showing only that the employees' services related mostly "to the original construction of buildings rather than to additions or alterations" (*id.* at 88), and, particularly, that it was "*not contended in this* [the *Turpin*] *case that any of the defendants' employees are engaged in interstate commerce*" as distinguished from the "*production of goods for commerce*" (*id.* at 88; see also 90, 92, 94; emphasis the court's). It was because of the meagerness and deficiencies in the record that the decision not to appeal the *Turpin* case was made.

[11] *Consulting Engineer*, January 1957 issue, pp. 86–92; February 1957 issue, pp. 77–82.

130,000 employees for the mid-March payroll period.[12] The *Consulting Engineer's* 1957 survey of the engineering profession shows that the average size of engineering firms is 31 persons, about two of whom are principals and the remainder about evenly divided between engineering and non-engineering employees (January issue, pp. 87–88). At peak periods, the average figure is about 50 persons, many firms, of course, employing a much larger number than this average, one or two of the largest firms having as many as 25,000 to 30,000 non-engineering employees during peak periods (*id.* p. 87). The survey also reports that 20 percent of the engineering firms also do architectural work to some extent and that the trend is toward combining both services in one firm (February issue, p. 77).

Contrary to the assumption by the court below that the business of such firms is "essentially local," the *Consulting Engineer's* survey reports that most of the firms in this field do *not* limit their operations to any one state; 72 percent of the engineering consulting firms are active in more than one state, and 28 percent have expanded their geographical range to foreign projects. The survey emphasizes that "consulting engineers are greatly expanding their geographical range," the situation being "quite different" today from "the scope of operations of firms

[12] United States Summary Part I County Business Patterns, Reporting Units, Employment, and Taxable Payrolls by Industry Groups under Old Age and Survivors Insurance Program Published by U. S. Department of Commerce and U. S. Department of Health, Education, and Welfare Table 1-A, p. 6.

when first organized," at which time 53% of the firms (in contrast to only 28% today) limited themselves to operation within one state. The survey adds: "This geographical expansion will continue. In fact 12 percent indicated that they plan to expand further their geographical fields of operation. Of these about two-thirds indicated that they planned to change from intra- to inter-state operation, while one-third plan to go into foreign work." (February issue, p. 79).

In addition to this expansion into direct interstate operation, the survey shows that industrial work (particularly for federal, state, and municipal governments) constitutes a major part of the business in this field and is constantly increasing. As of the time of the survey, 29% of the consulting engineering firms were doing work for the Federal Government, 28% for state governments, and 44% for local governments, and in every section of the country "a higher percentage of firms are increasing their work for Federal Government than are reducing their work for this client."[13] Some indication of the substantiality of this type of work is evidenced by the expenditures of the Army and Navy for architectural and engineering contract work during the year 1957, which totaled over $113,000,000 (on almost 2,000 contracts for $10,000 or more each).[14] Undoubtedly a large proportion of this work consists of the preparation of plans and specifications for interstate in-

[13] February issue, p. 81, Table 4, p. 82.

[14] This data was obtained from the Office of the Assistant Secretary of Defense for Supply and Logistics, Division of Review and Analysis.

strumentalities and facilities of the type that comprise a major part of the respondent Lublin, McGaughy firm's business (*supra*, p. 6, *infra*, pp. 45–47). Another major source of the business of such firms is highway construction. According to the Annual Report of the Bureau of Public Roads for Fiscal Year 1955, the state highway departments had committed 3.5 million dollars for fees to private engineering firms in connection with their federally-aided road projects alone (Annual Report, p. 7). This type of business will, of course, be considerably increased under the gigantic road construction program initiated by the 24 billion dollar Federal-Aid Highway Act of 1956 (Public Law 627—84th Cong., 2nd Sess., 70 Stat. 374). The Department of Commerce has estimated that the cost of preliminary engineering (surveys, detail plans, specifications and contract documents) required for this program will exceed 1¼ billion dollars (House Document No. 300, 85th Cong., 2nd Sess., p. 4, Table C, p. 6).

CONCLUSION

It is respectfully submitted that this petition for a writ of certiorari should be granted.

J. LEE RANKIN,
Solicitor General.

STUART ROTHMAN,
Solicitor,
BESSIE MARGOLIN,
Assistant Solicitor,
EUGENE R. JACKSON,
Attorney,
Department of Labor.

FEBRUARY 1958.

APPENDIX A

Opinion of the Court of Appeals

United States Court of Appeals for the Fourth Circuit

No. 7488

James P. Mitchell, Secretary of Labor, United States Department of Labor, appellant

v.

Lublin, McGaughy and Associates, a Co-Partnership, and Alfred M. Lublin, John B. McGaughy, William T. McMillan and William Marshall, Jr., Individually and Doing Business as Lublin, McGaughy and Associates, appellees

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, AT NORFOLK

(Argued October 23, 1957. Decided November 25, 1957)

Before Parker, Chief Judge, and Soper and Haynsworth, Circuit Judges

Bessie Margolin, Assistant Solicitor, United States Department of Labor (Stuart Rothman, Solicitor, Eugene R. Jackson, Attorney, and Jeter S. Ray, Regional Attorney, United States Department of Labor, on brief) for Appellant, and Robert C. Nusbaum and Alan J. Hofheimer for Appellees.

SOPER, *Circuit Judge:*

The Secretary of Labor brings this suit under the Fair Labor Standards Act, as amended,* against Lublin, McGaughy and Associates, a co-partnership, and against the individual members of the firm who are architects and engineers with a main office in Norfolk, Virginia, and a branch office in Washington, D. C. The complaint charges that the defendants have violated various sections of the statute, in that they have employed many persons in interstate commerce and in the production of goods for interstate commerce for workweeks longer than forty hours without compensating them for the excess hours of employment at rates not less than one and one-half (1½) times the regular rates at which they were employed, in violation of §§ 7 and 15 (a) (2) of the statute; and in that they have failed to keep adequate records of their employees' wages and hours and other conditions—as prescribed by the Federal Regulations—in violation of §§ 11 (e) and 15 (a) (5) of the Act; and in that they have transported goods in interstate commerce, in the production of which many of their employees had been employed, in violation of § 7 of the Act. An injunction was prayed restraining the defendants from further violation of the statute. The District Judge, after hearing, denied the relief prayed, resting his decision in large part on the conclusion that the plans and specifications prepared by the firm were not "goods" within the meaning of the Fair Labor Standards Act.

The principal questions to be considered grow out of the contentions of the Government: (1) that the drawings, plans and specifications prepared by the employees of the firm are "goods" and that the prep-

*Act of June 25, 1938, ch. 676, as amended by the Fair Labor Standards amendments of 1949, ch. 736; 29 U. S. C. § 201 et. seq.

aration thereof is "production of goods for commerce" within the meaning of § 3 of the statute; and (2) that the employees of the firm who participated in interstate travel and communications required for the conduct and co-ordination of the firm's offices in Norfolk and Washington were "engaged in commerce" within the meaning of § 7 (a) of the statute; and (3) that a large part of the work of the firm's draftsmen, fieldmen and clerical employees is so closely related to projects for the improvement, expansion or replacement of interstate instrumentalities as to bring them within the "in-commerce" coverage of the Act. The Government recognizes that employees engaged in a professional capacity are exempted by § 13 of the statute, but seeks to bring the non-professional employees of the firm within the coverage of the Act.

The defendants, who reside in Norfolk, are architectural and consulting engineers. They have worked and are now employed on numerous projects in Virginia, Maryland and the District of Columbia, and have worked on some projects in North Carolina and overseas. They include, primarily, projects for the improvement, enlargement and repair of installations at military bases, airfields, shipyards and radio stations for the United States military services, and also a substantial number of state and municipal undertakings and projects. These activities require constant co-ordination and communication, as well as transmission of information and materials between the two offices. In general, the defendants collect the necessary data for the projects, confer with their clients in regard thereto, and prepare the drawings, estimates and surveys which are used in connection with the projects. They also supervise and inspect the construction from an architectural and engineer-

ing standpoint by furnishing surveying and engineering services to contractors while construction is in progress.

To perform this work the defendants have about thirty employees in the Norfolk office and twenty employees in the Washington office, including architects, engineers, draftsmen, fieldmen, office managers, stenographers and bookkeepers. This action is concerned only with the nonprofessional employees consisting of draftsmen, fieldmen, clerks and stenographers.

In the course of the business necessary surveys and typographical maps are made and then the draftsmen, working under the supervision of the engineers and architects, prepare the drawings and designs from which blueprints are reproduced. The drawings, together with explanatory specifications, contain the information necessary for estimating the cost, financing the project, the bidding of contractors, and guidance to the contractor in constructing the project. The military, governmental and commercial structures on which the defendants are now and in recent years have been engaged are intricate in design and construction and could not be constructed without the plans and specifications prepared by the employees, many of which are transmitted across state lines. They consist of physical material of negligible value in itself, though, as copies of the master drawings, they contain information which may be of substantial value to the particular client in the construction of the project and in planning subsequent alteration and repair. It is estimated that on the average, one-half of the charges of the defendants for their architectural and engineering services is for work upon the master drawings and specifications and in the development of information embodied in them.

The plans, specifications and estimates prepared for government agencies, which comprised the greater part of the defendants' work, are submitted to these agencies and become their property. Frequently numerous copies of the specifications and drawings are required. The advertisement of a proposed government project results in requests for sets of plans and specifications from out-of-state contracting firms and these are sent by the Government to the prospective bidders to enable them to prepare and submit bids. When required by the terms of the contract the defendants furnish copies of the specifications and drawings which are reproduced by an outside blueprint company. For commercial clients copies of the drawings and specifications are furnished while the originals are retained by the defendants in case additional copies are needed. These copies are also obtained from commercial blueprint establishments at an additional cost to the clients.

The fieldmen include surveyors, transit men and chain men who work under the supervision of a professional engineer. They survey boundaries, take borings, etc. at the work site, frequently traveling from the District of Columbia to the site in Maryland and returning to the defendants' office in Washington in connection with their duties. They have little or no duty in the office but gather the material and bring it to the office as a basis for the preparation of the drawings and specifications. Some of the field work was done on projects for the Washington Suburban Sanitation Commission located in Maryland to which a large part of the time of the firm's Washington office has been devoted for the period of a year. A survey party reports to the Washington office each morning, drives to Maryland with the necessary field books and field equipment, makes surveys and gathers data, which is brought back to

the Washington office at the end of each day and turned over to the draftsmen. For approximately 50 per cent of their commercial clients, for whom a minor part of defendants' work is performed, the defendants supply employees who supervise the construction of the project so as to determine whether the construction is proceeding in accordance with the plans and specifications. An additional charge is made for this type of work.

Projects for the improvement or repair of interstate instrumentalities on which the defendants have worked include airfields and airplane facilities for which streets are widened or constructed, hangars are repaired or altered, and extensions are built. Radio and television facilities are relocated, repairs to government buildings at shipyards and machine shops are made, and other work in Maryland, Virginia and North Carolina is constructed.

Stenographers type letters, specifications and other documents, some of which are mailed to points out of the state. Some of the employees handle telephone calls, and some of those calls are from and to localities out-of-state. Payroll data for employees in the Washington office is mailed bimonthly to Norfolk where payroll checks are prepared and returned to Washington through the mail. Employees of the bookkeeping department, who prepare vouchers for the payment of bills of the defendant, prepare those for out-of-state as well as local creditors.

We consider first the contention of the Government which goes to the heart of the case, that the plans, drawings, specifications and blueprints prepared by the non-professional employees of the defendants are "goods" within the meaning of § 3 (1) of the Act where the term is defined as "goods, wares, products, commodities, merchandise, or articles or subjects of commerce of any character." The District Judge

held to the contrary, following the decision in *McComb* v. *Turpin*, D. C., Md., 81 F. Supp. 86, where, as in the pending case, an injunction was sought to prevent violation of the statute by architects and consulting engineers. One of the contentions of the Government was that the mere preparation of plans intended to be sent by mail, express or messenger to a client in another state constitutes production of goods for commerce. On this point, Judge Chesnut said (pp. 88 and 89):

> * * * This can be true only if the definition of the word "goods" as contained in the Act is construed to cover the preparation of the plans, drawings and specifications referred to in the stipulation. The definition [§ 203 (i)] defines "goods" to mean "goods * * * wares, products, commodities, merchandise, or articles or subjects of commerce of any character, or any part or ingredient thereof." I do not think even this broad literal definition could fairly be construed to apply to the plans, drawings and specifications prepared by or under the supervision of the defendants or their employees. They are only a physical embodiment in words of professional conclusions.
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> Certainly the word "goods" could not be construed to include professional advices and its definition should not be construed to include the typewritten or mechanical expression by which the advice is given. These plans, drawings and specifications are not themselves the subject of barter or sale, but only the written embodiment of professional advice, and incidental thereto. They are specifically prepared to meet the particular problem of a specific client and are not sold or offered for sale to the public generally. They are, of course, quite unlike stocks, bonds and commercial paper which are themselves instrumentalities

of commerce. *Bozant* v. *Bank of New York*, 2 Cir., 156 F. 2d 787. This distinction was well made by Circuit Judge Learned Hand in the case just cited, 156 F. 2d at page 789 as follows:

> "Some of the activities which went on, we agree, should on no theory be counted. A lawyer who is in the course of his practice writes letters, or draws deeds or wills, or prepares briefs and records, is not on that account within § 203 (j); and the same is true of the correspondence of a broker and of a banker. The definition of 'goods' in § 203 (i) might literally go so far even as that; but it would be unreasonable to the last degree to suppose the Congress meant to cover such incidents of a business whose purpose did not comprise the production of 'goods' at all."

The Department of Labor cited this decision in its Interpretative Bulletin, Part 776, Subpart A, General (May, 1950), Title 29, Chapter V, Code of Fed. Reg. (776.19 (b) (2)), where it said:

> On the other hand, the legislative history makes it clear that employees of a "local architectural firm" are not brought within the coverage of the Act by reason of the fact that their activities "include the preparation of plans for the alteration of buildings within the state which are used to produce goods for interstate commerce." Such activities are not "directly essential" enough to the production of goods in the buildings to establish the required close relationship between their performance and such production when they are performed by employees of such a "local" firm.

We are now told, however, that this pronouncement is no longer tenable because of the decisions of the Supreme Court in *Western Union Telegraph Co.* v. *Lenroot*, 323 U. S. 490 (January 8, 1945), and

Powell v. *U. S. Cartridge Co.*, 339 U. S. 497 (May 8, 1950). In the *Western Union* case the Supreme Court held that telegraph messages are "goods" within the meaning of § 203 (i) because they are "subjects of commerce", one of the terms in the inclusive list enumerated in the section. In the course of the opinion, the Supreme Court noted that in *Western Union Telegraph Co.* v. *Pendleton*, 122 U. S. 347, in declaring invalid a statute which attempted to regulate the activities of telegraph companies, it had held that intercourse between the states by telegraph messages amounts to interstate commerce in the transportation of "ideas, wishes, order, and intelligence". This holding, it is now said, demonstrates that the embodiment of ideas contained in plans and specifications are also "goods" within the meaning of the Act.

The *Powell* case held that munitions manufactured by a private contractor at a government plant were "goods", and that his employees were engaged "in the production of goods for commerce". Munitions were held to be "goods", because they were "products" within the meaning of § 203 (i) of the statute; and the employees were held to be engaged in the production of "goods" for commerce, although the munitions were not to be sold but used in the war, because of their "transportation" to destinations outside the state.

We do not think that these decisions require us to abandon the conclusion reached by Judge Chesnut and by Judge Hoffman in the pending case. The Department of Labor itself did not give this effect to the *Western Union* decision of 1945, notwithstanding the holding therein that the transportation of ideas embodied in tangible form may amount to commerce between the states. On the contrary, it issued its Bulletin in 1950 following the lines laid down by

Judge Chesnut. The practical distinction between the business of interstate communication by telegraph and the activity of making plans and drawings which are used merely as guides for building construction, is so obvious as not to deserve further discussion. Nor does the *Powell* case support the Government's position. It does show that the term "goods" in § 203 (i) of the statute is not limited to those bought and sold, but its holding that munitions of war are "goods" in no way tends to show that such articles as plans and specifications, which possess markedly different characteristics, are also "goods" in the statutory sense.

The defendants in this case were independent engineers and architects engaged in essentially local activity in each of the offices which they maintained. They were not employed to manufacture documents to be sold or transported in interstate commerce but to give professional advice and assistance which of necessity was given permanent form as plans or specifications so as to be available for guidance and reference. Clearly such plans were not "goods" in the ordinary case, although it is possible to conceive a situation in which standard plans or blueprints for building construction might be prepared for transportation or sale in such a way as to fall within the coverage of the Act. That, however, did not happen here. The copies of the plans that were made and sent out for the convenience of the clients and their bidders were not transported as subjects of commerce but in order to show the interested parties the sort of construction that was required; and the mere fact that the documents crossed state lines did not alter their inherent nature.

The second contention of the Government is based on the interstate travel and communication of the employees of the firm between its two offices and

between these offices and the locations of its out-of-state clients and their contractors. It is said that these activities constitute engagement "in commerce" even though the plans and specifications are not "goods" produced in commerce within the meaning of the Act; and many cases are cited in which the Courts have found that the transportation of documents and records as well as the travel of employees from state to state are forms of interstate commerce which subject the participants to regulation by Congress. Thus the Courts have pointed out that the use of the mails and other facilities of interstate commerce perform an important, if not a vital function in the operation of businesses which extend beyond state boundaries, e. g., a holding company in control of corporations operating in seventeen states, *North American Co.* v. *S. E. C.*, 327 U. S. 686, 694, 695; the production and presentment of theatrical attractions on a multistate basis, *United States* v. *Schubert,* 348 U. S. 222; the business transactions across state lines of a fire insurance company, *United States* v. *Underwriters Assn.,* 322 U. S. 533; the business of conducting schools by means of correspondence through the mails from state to state, *International Text Book Co.* v. *Pigg,* 217 U. S. 91; *Federal Trade Commission* v. *Civil Service T. Bureau,* 6 Cir., 79 F. 2d 113; and the business of communications itself by use of the telegraph, *Western Union Telegraph Co.* v. *Lenroot,* 323 U. S. 490, and by newspaper, *Associated Press* v. *N. L. R. B.,* 301 U. S. 103. Similar rulings involving the Fair Labor Standards Act have also been made where interstate communication was not the principal or direct aim and necessity of the enterprise but, nevertheless, performed an important function. Thus in *Donovan* v. *Shell Oil Co.,* 4 Cir., 168 F. 2d 229, it was held that a clerk who prepared payroll checks mailed to

employees in different states and kept personnel and statistical records in the office of an oil company concerned with the interstate transportation of petroleum products was engaged in commerce; and in *Durkin* v. *Joyce Agency,* D. C., N. D., Ill., 110 F. Supp. 918, 923; 348 U. S. 945, that clerks and switchboard operators employed by a warehouse corporation concerned with interstate transportation who used the telephone and mails in carrying on the business were engaged in interstate commerce, and in *Aetna Finance Co.* v. *Mitchell,* 1 Cir., 247 F. 2d 190, that employees of a loan company whose operation involved a constant flow of documents, information, etc., through the mails were engaged in interstate commerce. The transportation of persons from state to state in the course of business operations may also constitute interstate commerce, *Edwards* v. *California,* 214 U. S. 160; *Caminetti* v. *United States,* 242 U. S. 470; *Hemans* v. *United States,* 6 Cir., 163 F. 2d 228, 239; *Cleveland* v. *United States,* 329 U. S. 14.

It is manifest however, notwithstanding this well established line of authority, that the mere use of the mails and of transportation facilities across state lines is not necessarily interstate commerce. There must be some relation to a business which is interstate in character. This is found most clearly where the very essence of the business is interstate commerce itself, as in the sending of telegraph messages, and it also exists where the employer's business is interstate in character, as illustrated above, in the course of which interstate communication is a material part. But where the business is essentially local and there is no production of "goods", communication which is merely incidental to the local enterprise cannot be classed as commerce. The interoffice communication in this case related to the local production of plans and

specifications, and the fieldmen who travelled from state to state were sent out to get the information as to the character of the work to be done, so that the architects and engineers might do their preparatory work. All of these activities related to the production of plans, partook of their intrastate character, and cannot be fairly characterized as commerce between states.

Finally, the Government contends that it should prevail because the work of certain draftsmen, fieldmen and clerical employees relates to projects for the improvement, enlargement and repair of instrumentalities of interstate commerce, for the most part military installations, airfields, shipyards and radio facilities for the United States, as well as municipal governmental projects such as turnpikes and road improvements, and projects for private enterprise such as was done in the remodeling of Trailway Bus terminals in Washington and in Baltimore. Undoubtedly the term "in commerce" covers not only the activity of workers who share directly in the work of construction but also those who do the paper work, such as the preparation of lists of material or payrolls, or who serve as fieldmen and timekeepers on the job. In some cases there is reference to the preparation of plans or drawings for construction work by employees of the contractor as evidence that work "in commerce" is being performed. See *Laudadio* v. *White Const. Co.*, 2 Cir., 163 F. 2d 383, 386; *Ritch et al.* v. *Puget Sound Bridge & Dredging Co., Inc.*, 9 Cir., 156 F. 2d 334, 337; *Archer* v. *Brown*, 5 Cir., 241 F. 2d 663, 668; *Chambers Const. Co.* v. *Mitchell*, 8 Cir., 233 F. 2d 717, 723; *Mitchell* v. *Vollmer & Co.*, 348 U. S. 427. There is, however, no clean-cut holding that the work of employees of independent architects, such as are before us in this case, is "commerce" under the Act.

It may be that the activities of the employees in question constitute an indispensable link in the chain of causation whereby instrumentalities of commerce are extended or improved; but it does not follow that their work is so closely connected with interstate commerce as to be a part of it. In determining the question, the character of the work of the employees rather than the occupation of the employer is the controlling factor, but the occupation of the employer must nevertheless be taken into consideration, for the Act does not attempt to regulate local activity. This is most clearly shown by contrasting the decision of the Supreme Court in *Borden Co.* v. *Borrella,* 325 U. S. 679, with its decision in *10 E. 40th St. Co.* v. *Callus,* 325 U. S. 578, which were decided on the same day. In the first case it was held that the maintenance employees of a building owned and chiefly used for central offices by an interstate producer were within the regulated area as persons engaged in an occupation necessary to the production of goods for commerce; but in the second case it was held that employees doing the same kind of work in a metropolitan office building operated as an independent enterprise and used by every variety of tenants, including producers of goods for commerce, did not have such a close and immediate tie with the processes of production as to be covered by the Act. The Court said, 325 U. S. 583:

> * * * Mere separation of an occupation from the physical process of production does not preclude application of the Fair Labor Standards Act. But remoteness of a particular occupation from the physical process is a relevant factor in drawing the line. Running an office building as an entirely independent enterprise is too many steps removed from the physical process of the production of goods. Such remoteness is insu-

> lated from the Fair Labor Standards Act by those considerations pertinent to the federal system which led Congress not to sweep predominantly local situations within the confines of the Act. To assign the maintenance men of such an office building to the productive process because some proportion of the offices in the building may, for the time being, be offices of manufacturing enterprises is to indulge in an analysis too attenuated for appropriate regard to the regulatory power of the States which Congress saw fit to reserve to them. Dialectic inconsistencies do not weaken the validity of practical adjustments, as between the State and federal authority, when Congress has cast the duty of making them upon the courts. Our problem is not an exercise in scholastic logic.

The partners in the pending case may be likened to the owners of the general office building in the *Callus* case. They did work for a general miscellany of clients in connection with construction projects, some of which were local in nature while others were such that the construction workers themselves were within the coverage of the Act. But the architectural work itself was local and of necessity gave color to the activities of their subordinates and took them outside the scope of the statute. It is this element which the Government and the decision in *Mitchell* v. *Brown,* 8 Cir., 224 F. 2d 359, upon which the Government relies, seem to ignore. For these reasons we do not think that the employees of the defendants were subject to the provisions of the statute. This is not to say that some employees of the firm may not have participated so actively at the site of construction as to be covered; and nothing in this decision is intended to preclude further proceedings as to them. There is however no sufficient showing of the nature

of their activities in the record in this case as to justify the issuance of an injunction.

Affirmed.

Judgment

Filed and Entered November 25, 1957.

United States Court of Appeals for the Fourth Circuit

No. 7488

JAMES P. MITCHELL, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, APPELLANT

v.

LUBLIN, McGAUGHY AND ASSOCIATES, A CO-PARTNERSHIP, AND ALFRED M. LUBLIN, JOHN B. McGAUGHY, WILLIAM T. McMILLAN AND WILLIAM MARSHALL, JR., INDIVIDUALLY AND DOING BUSINESS AS LUBLIN, McGAUGHY AND ASSOCIATES, APPELLEES

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

This cause came on to be heard on the record from the United States District Court for the Eastern District of Virginia, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the order of the said District Court appealed from, in this cause, be, and the same is hereby, affirmed.

MORRIS A. SOPER,
United States Circuit Judge.

NOVEMBER 25, 1957.

APPENDIX B

Respondents' Projects for Improvement, Repair or Enlargement of Interstate Instrumentalities or Facilities

1. AIRFIELDS AND AIRPLANE FACILITIES

Widening streets on a naval operating base in the vicinity of the base motorpool and post exchange, and extending and paving plane taxiways and parking aprons at the Naval Air Station installation at Oceana, Virginia, which is a naval jet base and part of the East Coast defense system for intercepting enemy aircraft (Stip. R. 16a; Job No. 928, R. 25a). Replacing paving between hangars at the Naval Air Station at Norfolk, Virginia (Stip. R. 16a; Job No. 881, R. 22a). It was agreed at the trial that the Navy airplanes using both these facilities regularly fly across State lines (R. 84a).

Repair and alterations of hangars at the Naval Air Station at Oceana, Virginia (a naval jet air base, part of the East Coast defense system for intercepting enemy aircraft) (Jobs Nos. 892, 892–1; Stip. R. 16a, 22a, 23a); the Naval Air Station in Washington, D. C. (Job No. 963, R. 29a, repairs to three hangars); and the Naval Air Station at Norfolk, Virginia (Job No. 901, R. 23a) (alterations to Hangars LP4 and LP14); advance planning for runway extension, Byrd Field (Job No. 822, R. 20a); advance planning report for pneumatic test facility, Naval Air Station, Norfolk, Virginia (Job No. 921, R. 25a); estimates for

Pinecastle Air Force Base, Florida (Job No. 833, R. 21a); pile test, Langley Field, Virginia (Job No. 835, R. 21a); estimates for Beaufort, South Carolina, Airfield (Job No. 882, R. 22a); advance planning, Naval Air Station, Norfolk, Virginia (Job No. 748, R. 18a) and work relating to Patuxent Air Station, Maryland (Job No. 869, R. 22a).

2. SHIPYARDS

Repairs to buildings located at the United States Navy Ship Yard, Portsmouth, Virginia (Job No. 948, R. 28a—repairs to 10 buildings, and Job No. 952, R. 28a—repairs to buildings) and other miscellaneous projects (Jobs Nos. 853 and 903; R. 21a, 23a); repairs to Pier 12, Naval Operating Base, Norfolk, Virginia (Job No. 965, R. 29a); and work relating to the machine shops and administrative buildings at the Norfolk Navy Yard and Norfolk Naval Base, Norfolk, Virginia (Stip. R. 16a; Job No. 920, R. 25a).

3. RADIO AND TELEVISION FACILITIES

Relocation of the Coast Guard Radio Station at Oceana, Virginia (Job Nos. 785, 917, R. 19a, 24a). Making the necessary site examination and preparing the advance planning report for relocating the Coast Guard Radio Station at Oceana, Virginia, which is a part of the Oceana Naval Air facility. When the new station is completed, the old station will be abandoned. A letter of intent to proceed with the final plan and specifications for this project has been received by appellees from the Navy (R. 69a–70a). Work relating to television station WAVY, Portsmouth, Virginia (Job No. 754, R. 18a).

4. TURNPIKE AND ROAD IMPROVEMENTS, BUS TERMINAL REPLACEMENT AND WATER AND SEWER UTILITIES

Road improvements, Oceana, Virginia (Job No. 911, R. 24a); Richmond Turnpike (Job No. 814, R. 20a); Old Dominion Turnpike Authority (Job No. 847, R. 21a); road survey, Columbia, North Carolina (Job No. 788, R. 19a). Replacement of the Trailways Bus Terminal in Washington, D. C. (R. 90a). Numerous water and sewer designs for the Washington Sanitary Commission (Job Nos. 893, 893–1 through 893–3, 939, 939–1 through 939–24; R. 23a, 26a–27a).

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